



Ojung'a v Healthlink Matcare Ltd t/a Nairobi Women Hospital (Cause 1620 of 2018) [2023] KEELRC 1607 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1607 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1620 OF 2018
BOM MANANI, J
JUNE 29, 2023**

BETWEEN

SCOLINE ANYANGO OJUNG'A CLAIMANT

AND

**HEALTHLINK MATCARE LTD T/A NAIROBI WOMEN
HOSPITAL RESPONDENT**

JUDGMENT

Introduction

1. Until 5th April 2018 when her services were terminated, the Claimant had been serving as an employee of the Respondent in various capacities since 19th April 2010 when she was first engaged as an Internal Auditor. At the time of her exit from employment, the Claimant was serving in the position of Hospital Manager at the Respondent's Hurlingham branch.
2. The Claimant asserts that she was unfairly dismissed from her employment. Hence, her claim seeking the various reliefs as more particularly set out in her Memorandum of Claim.
3. The Respondent has resisted the claim. It is the Respondent's case that the decision to terminate the employment relation between the parties was for valid reason and followed lawful procedure.

Claimant's Case

4. According to the Claimant, she was first engaged by the Respondent on 19th April 2010 in the position of Internal Auditor. She grew through the ranks to the position of Hospital Manager, a position that she held until 5th April 2018 when she lost her job.
5. Throughout her employment, the Claimant asserts that she performed her duties diligently a fact that is allegedly evidenced by the several promotions and awards that she got. At the point of exit, her salary had grown to Kshs 214,480.00 per month.



6. The Claimant asserts that she is a practicing Seventh Day Adventist. According to her, Saturdays are considered as worship days for this Christian faith. Consequently, Seventh Day Adventists do not work on this day. In order to observe this practice, the Claimant states that she asked the Respondent to excuse her from work on Saturdays.
7. In response, the Claimant states that the Respondent asked her to be working the first Saturday of every month and commit the remaining Saturdays in the month to her worship. To compensate for the Saturdays that she was going to be off duty in any given month, the Claimant indicated her availability to work on Sundays since the institution works seven days a week. The parties settled for this arrangement. This compromise is said to have been sealed in August 2016.
8. The Claimant states that on 21st February 2018, the Respondent held a budget approval meeting at which the budget for the Respondent's Hurlingham branch failed to sail through. The branch was asked to make adjustments to the proposal and present the revised budget on 24th February 2018, a Saturday.
9. The Claimant states that in line with the instructions, she retreated with her budget making committee for the branch and revised the budget statement. According to her, the proposal was circulated and she instructed one of her team members to present it on her behalf at the meeting of 24th February 2018 since this day fell on a Saturday, her worship day. The Claimant states that she ensured that the budget document was appropriately revised along the lines proposed by the budget approval committee and all that remained was to present the final script on 24th February 2018.
10. It is the Claimant's case that she in the meanwhile wrote an email to the Respondent's management on 23rd February 2018 asking to be excused from the meeting of 24th February 2018 as the event coincided with her worship day and she had scheduled church activities on the same day. She also sent a text message to a member of the Respondent's management on the subject.
11. The Claimant states that her request to be excused from the meeting was declined. It is her case that the refusal to allow her to attend to her worship day was in violation of her freedom of religion. The refusal put her in the unfortunate position where she had to choose between her religion and work. She chose to respect the worship day and thus failed to turn up for the meeting.
12. It is the Claimant's case that the Respondent's action was unreasonable and in breach of prior arrangement between the parties regarding her worship days. According to her, the 2016 arrangement required her to work on the first Saturday of every month and dedicate the rest of the Saturdays in the month to her worship. In line with this arrangement, the Claimant states that she had already reported to work on the first Saturday of February 2018. Consequently, she did not expect that the Respondent would insist on her reporting to work another Saturday in the month when the Respondent was aware that apart from the first Saturday of every month, the other Saturdays were her days off duty.
13. In any event, it is the Claimant's case that she had made adequate arrangements for the budget to be presented by one of her teammates. Therefore, the budget approval event was going to happen notwithstanding her absence.
14. The Claimant states that budget making at the branch level was a joint process undertaken by a team. Although she was the head of her team, it is her case that any of her teammates was competent to present the document so long as she was sufficiently briefed on the subject. It is the Claimant's case that nothing in the work regulations prohibited her from delegating the process of budget presentation to any of her team members.



15. The Claimant reads discrimination in the manner in which she was treated by the Respondent. She states that on several occasions, she had been forced to choose between her faith and her job unlike her colleagues who worship on Sundays since nobody was forced to report to work on Sunday.
16. The Claimant asserts that the decision to terminate her contract of employment on account of her failure to report to work and present the final budget on 24th February 2018 was in the circumstances unfair and discriminatory. The decision infringed on her right to be protected from discriminatory practices in contravention of article 27 of the Constitution as read with sections 5 and 46 of the Employment Act.

Respondent's Case

17. On its part, the Respondent does not deny that the Claimant is indeed a practicing Seventh Day Adventist. The Respondent's management in fact acknowledges that in recognition of this fact, it had put in place a schedule which allowed the Claimant time off a few Saturdays every month to enable her to attend to her worship.
18. The Respondent however states that the Claimant's right to worship is not absolute. It has to be practiced reasonably in order to accommodate other needs whenever they arise.
19. The Respondent asserts that the Claimant was not entitled to be treated in a special way on account of her faith since this would in itself be discriminative of other employees. That the accommodation granted to the Claimant to work on one Saturday every month was subject to the contract of employment between the parties.
20. It is the Respondent's case that owing to the position that the Claimant held in the organization, she ought to have internalized her obligation to work as and when required. Any inconvenience occasioned as a result was to be compensated through the applicable overtime pay or off days.
21. The Respondent further asserts that the budget making process happens once every year and is a critical activity in the calendar of the institution. As a result, the Claimant being the branch budget holder was under duty to attend the event of 24th February 2018. It was not open to her to delegate such a critical function to another member of her team.
22. The Respondent states that in any event, the reason why the activity was pushed to 24th February 2018 was because of the failure by the Claimant to present an acceptable budget in the first instance. This failure had resulted in the matter being revisited severally. As the process was approaching its deadline on 28th February 2018, it had to be concluded with some measure of urgency. This prompted the decision to have the final session on 24th February 2018.
23. It is the Respondent's case that when the committee settled for 24th February 2018, the Claimant was in attendance. Yet, she did not object to the date. And neither did she suggest an alternate date. Therefore, there was no excuse for her failure to attend the meeting.
24. The Respondent denies that the Claimant sought permission to be absent from the meeting of 24th February 2018. According to the Respondent, all that the Claimant did was to send an email on 23rd February 2018 at about 11 am and a subsequent text message indicating that she will not be able to attend the session. That the email was not a request for permission to be absent but a mere statement about her intended absence.



25. The Respondent's position is that the decision to terminate the Claimant's contract was not due to her religious beliefs but her failure to heed work instructions and deliver on her mandate. Therefore, her claim that she was victimized on account of her faith is farfetched and untrue.

Issues for Determination

26. The parties filed their individual versions of issues. Having regard to the pleadings and evidence on record, it is apparent that there is no dispute that the parties had an employment relation until April 2018 when it was terminated. What are contested are only two issues. These are: whether the employment relation between the parties was lawfully terminated; and whether the parties are entitled to the reliefs that they seek in their pleadings. It is these two issues that I will consider.

Analysis

27. Although the Respondent asserts that the dispute between the parties had nothing to do with the Claimant's religion, the evidence on record demonstrates that this issue was at the heart of their problem. It is true that the decision to terminate the Claimant's contract arose from her failure to attend the budget meeting of 24th February 2018 and present her branch budget proposal contrary to the Respondent's expectations. It is also clear from the evidence on record that the reason for the Claimant's failure to attend the meeting was her religious convictions. As a practicing Seventh Day Adventist, she believed that 24th February 2018, a Saturday, was her day of worship. Therefore, the argument by the Respondent that the Claimant's religion was not a factor that led to the ultimate separation of the parties is evidently misleading.
28. Matters of religion are taken rather seriously in Kenya and perhaps worldwide. They are as universal as they are personal.
29. In Kenya, the *Constitution* recognizes freedom of religion. Article 32 of the *Constitution* guarantees every individual freedom of conscience, religion, belief and opinion. Article 32(4) of the *Constitution* is even more emphatic on protection of this freedom. It provides as follows:-
- "A person shall not be compelled to act or engage in any act that is contrary to the person's belief or religion."
30. It is true as the Respondent suggests that some rights including freedom of religion are not absolute. Sometimes, they may be limited. However, limitations to these rights can only be imposed in the manner that is contemplated in law.
31. Under article 24 of the *Constitution*, no right in the Bill of Rights can be limited except by law. Even then the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
32. The decisions relied on by the Respondent to support the argument that freedom of religion can be limited must be analyzed in this context. In the case of *Republic v Head Teacher, Kenya High School and another Ex-Parte SMY* (2012)eKLR, it is noteworthy that the court's decision proceeded on the premise that the minor's right to practice her religious beliefs had been circumscribed by regulations that were issued pursuant to the *Education Act*. On the other hand, the decision in *Ndanu Mutambuki and 119 others v Minister for Education and 12 other* (2007) eKLR was made under the retired constitutional dispensation which was markedly different from the current constitutional dispensation regarding protection of human rights. Finally the decision in *Nyakamba Gekara v Attorney General & others* (2013) eKLR did not address the requirement under article 24 of the *Constitution* that any



limitation to a right must be by legislation. Indeed, this decision was to later be criticized by the Court of Appeal in the case of *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017 eKLR for *inter alia*, the aforesaid reason.

33. Article 27 of the *Constitution* proscribes discrimination on various grounds. These include religion. Importantly this article guarantees everyone equal protection and benefits of the law. It underscores the fact that equality before the law must be understood to denote the fact that everyone is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the fullest extent possible. This constitutional provision is echoed in sections 5 and 46 of the *Employment Act*.
34. That the Respondent was aware that the Claimant is a practicing Seventh Day Adventist cannot be gainsaid. This fact is confirmed by the Respondent's witness. That the Respondent had been aware of this fact for a long time cannot be denied. This is confirmed by the fact that the Respondent had as early as August 2016 asked the Claimant to sacrifice one of the four Saturdays in a month to report to work and go to church the rest of the Saturdays. It is therefore clear to my mind that on 21st February 2018 when the Respondent's budget committee fixed the next budget committee meeting for Saturday 24th February 2018, they were fully aware of the fact that this was the Claimant's worship day, something that the *Constitution* protects.
35. It is therefore surprising that the Respondent can argue that the Claimant needed to request to be excused from the Saturday meeting but she never did so. It is also surprising that the Respondent would argue that when the date of 24th February 2018 was fixed on 21st February 2018, the Claimant never protested to say that the date was inconvenient. Why would the Respondent require the Claimant to restate what the Respondent's management was already aware of? Why would the Respondent's management proceed to fix their meeting for Saturday 24th February 2018 and expect attendance by the Claimant when they were fully aware that this was the Claimant's worship day? Did the fact that this was the Claimant's worship day mean nothing to the committee? Was the committee not aware of its constitutional obligation to respect, uphold, promote and protect the Claimant's constitutional right and freedom to worship?
36. The Claimant gave evidence that there was an agreement between her and the Respondent's management that she will be working the first Saturday of every month. This fact is confirmed by the Respondent's email of 5th August 2016 which was tendered in evidence. Pursuant to this arrangement, the Claimant stated that she had already worked on 3rd February 2018. This evidence was not negated by the Respondent. Why would the Respondent expect the Claimant to again work on 24th February 2018 in breach of their arrangement which was intended to ensure that she enjoys her constitutional right of freedom of worship?
37. The Claimant gave evidence that in recognition of the importance of the budget making process and the meeting of 24th February 2018, she ensured that the budget paper was revised and made ready for presentation come the day of the meeting. She also testified that she made adequate arrangements for a team member from her committee to attend the session and present the budget on her behalf.
38. The Claimant also gave evidence that there was no regulation that barred her from delegating the function of presenting the revised budget paper to one of her team members to present it on the material day. Indeed, there was evidence that on 24th February 2018 the paper was presented and approved.
39. The assertion by the Respondent's management that the Claimant's team members were not qualified to present the budget is without basis. If this was the case, why did the committee allow the team member who had been tasked by the Claimant to make the presentation to go ahead and present the



revised budget paper? Why did the Respondent's committee approve a budget that was presented by a person who was not competent to present it? What evidence demonstrated that the Claimant's team members were in any event unqualified to present the revised proposal?

40. It is true that budget making for an institution is critical. It is also true that this function requires close supervision by the team leaders. However, this is not the same thing as to say that the process must be as rigid as the Respondent suggests.
41. In any event there was no evidence provided to augment the Respondent's assertions about the budget presentation procedure. The assertion that only the branch team leaders were to present the final document to the budget committee was not supported by cogent evidence. There was no evidence that the Respondent's regulations barred budget team leaders from delegating this function to their team members. The fact that the Claimant's contract of employment required her to be responsible for the quality of her work did not mean that she could not delegate part of the branch budget making functions if she felt it was appropriate to do so.
42. The fact that the Claimant requested to be excused from the meeting of 24th February 2018 is self evident. The fact that she indicated why she was unable to attend the meeting is also self evident. She sent an email to one Eunice Munyinyi on 23rd February 2018. The email in part read as follows:-

“ Dear Munyingi,

Kindly pardon me for tomorrow's meeting. I have commitments in church that I am obliged to meet and will not make it for the meeting. Together with the HODs, we discussed and made amendments to the budget operations plan and sent it. We also discussed the Hurlingham Medicare Floor plan and forwarded. I have briefed Rose and she will do the presentation. I will make sure that I bring myself up to speed with the feedback.

Kind regards,

Scoline”

43. This email was sent one day before the date of the meeting. The Respondent's management does not deny receiving the email. In fact, receipt of the email was confirmed by attendees at the disciplinary session convened against the Claimant.
44. In addition to the email, there is evidence that the Claimant sent a text to the Respondent's management over the same subject. Despite these correspondences, the Respondent's witness asserts and would wish the court to believe that the Claimant did not seek permission to be away from the meeting.
45. What comes out clearly is that the Respondent's management was determined to have the Claimant attend the session of 24th February 2018 irrespective of her pleas to be excused from it. To the management, the budget process had to be concluded on this day irrespective of the cost of the decision on the Claimant's right to worship.
46. The insistence by the committee that only the Claimant and nobody else presents the budget statement at the session even when it was clear that this would infringe on the Claimant's freedom of religion is disturbing. As indicated earlier article 32 (4) of the *Constitution* forbids anyone from forcing another to act in a manner that is contrary to his religious beliefs. To require the Claimant to work on Saturday despite the fact that Seventh Day Adventists (to which the Claimant belongs) recognize this day as a worship day was in contravention of the *Constitution* (see *J W M (alias P) v Board of Management*



- [O High School & 2 others](#) [2019] eKLR). The Respondent had a duty to respect and uphold the Claimant's right to worship.
47. There is no law that the Respondent cites as permitting it to limit the enjoyment of this right by the Claimant. There was no evidence presented to demonstrate that if there was limitation on the right, it was reasonable and justifiable in an open and democratic society.
48. The Respondent argues that the budget making process had a deadline for 28th February 2018. It is however not clear why the Respondent did not schedule its meeting for either 23rd February 2018 or 25th February 2018 or such other earlier date to address its desire to conclude the approval process in time for the deadline without infringing on the Claimant's freedom of religion which the Respondent had a constitutional obligation to protect. Why had the meeting to fall on 24th February 2018, the Claimant's worship day and not any other earlier date?
49. In her evidence, the Respondent's witness stated that the committee settled for 24th February 2018 to suit the convenience of the budget committee members and also meet the deadline of the budget making process. When asked why the committee did not consider the convenience of the Claimant, she stated that the Claimant did not protest that the date was inconvenient to her. Was it necessary for the Respondent to require the Claimant to restate that 24th February 2018 was her worship day even when it was clear that this information was already within the knowledge of the Respondent's management? Was it right for the committee to sacrifice the Claimant's right to worship on the altar of their convenience? Is such consideration reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?
50. There is no doubt that the Respondent's budget making process was of critical importance to it. It is also clear to me that the Claimant's freedom of religion was of equal significance to her. the [Constitution](#) obligated the Respondent to respect and protect this right. It was up to the Respondent to find a way of balancing its business interests with the Claimant's freedom of religion without prejudicing the latter. The parties could for instance have agreed to schedule their meeting for 23rd February 2018 (see [Robert Mboya Nyaringo v Kenya Forest Service & another](#) [2014] eKLR).
51. The evidence on record leaves me with little doubt that the Claimant had been subjected to unnecessary hardship at the workplace because of her religious beliefs. Her faith requires her to observe the Sabbath every Saturday. Yet there is evidence that the Respondent made every effort to push the Claimant into compromising on this requirement. That is how she was eventually pushed into working on one Saturday every month despite the fact that her faith does not permit it. Instead of protecting the Claimant's right of worship as obligated by the [Constitution](#), the Respondent was infringing on it in order to promote its business interests.
52. The law obligates every employer to provide employees with one rest day in the seven days that comprise a week. The Claimant states that she was ready at all times to work on Sunday since the hospital runs seven days a week. Why the Respondent could not accommodate this arrangement and move the Claimant's rest day to Saturday to coincide with her worship day so that she works on Sunday remains a mystery.
53. It is clear however that Sunday was left undisturbed for the other employees who consider it as their worship day. Indeed, the Respondent's witness confirmed that Sunday was their rest day. Only frontline members of staff were required to be on duty.
54. This evidence leaves me with no doubt that the Respondent's conduct infringed on the Claimant's freedom of religion. The fact that the Respondent would fail to allow the Claimant to be off duty all Saturdays despite knowledge that this was the Claimant's worship day was clearly discriminatory



treatment against the Claimant. The fact that the Respondent's budget committee would decide to convene its meeting on Saturday 24th February 2018 because it was convenient for them even as it was clear that this would infringe on the Claimant's freedom of worship was clearly discriminatory (see *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017 eKLR]). The committee's conduct was reckless towards and uncaring about the Claimant's protected right to worship.

55. The fact that the Respondent terminated the Claimant's employment for failure to attend the meeting that coincided with her prayer day was clearly unfair. Moreover, there is evidence that the Claimant had made arrangements to be represented at the meeting by her team member and there was no rule barring her from delegating this function. It is therefore confounding to reason that the Respondent would in the face of this accuse the Claimant of disobeying lawful orders and failing to discharge her duties.
56. Under sections 41, 43 and 45 of the *Employment Act*, the employer is obligated to prove that the ground for terminating the employee's contract is valid. For the Respondent, the basis of its decision to terminate the Claimant's employment was alleged gross misconduct by the Claimant. The basis of this assertion was that the Claimant failed to attend the budget approval meeting of 24th February 2018 contrary to express instructions by the Respondent.
57. However, and as has been demonstrated, the Claimant did not attend the said meeting because the event coincided with her worship day, a matter that was within the Respondent's knowledge. It has also been demonstrated that in a bid to balance the demands on her time, the Claimant asked her teammate to attend the meeting and present the budget paper. It has also been demonstrated that the Claimant wrote to the Respondent to seek to be excused from the session due to religious reasons. It has also been demonstrated that there was no regulation that barred the Claimant from delegating the responsibility of presenting the revised budget paper to her teammates. It has also been demonstrated that the appointed teammate attended the session and successfully presented the budget paper.
58. Importantly, the *Constitution* obligates the Respondent as the employer and duty bearer to respect and uphold the Claimant's freedom of religion. A duty bearer cannot be said to have established a valid reason to terminate an employee's contract of service if all that is shown is an attempt to impede the employee's enjoyment of a constitutional right. Consequently, it is clear to me that the Respondent has failed to establish that it had a valid reason to terminate the Claimant's contract of service.

Determination

59. Based on the foregoing analysis, I arrive at the conclusion that the Respondent has not established that it had valid reason to terminate the Claimant's contract of service. Accordingly, I declare the Respondent's decision to terminate the employment contract between the parties unlawful.
60. The evidence on record demonstrates that the Respondent discriminated against the Claimant on account of her religion. The Respondent paid lip service to the Claimant's freedom of worship by demanding that she works on some Saturdays despite acknowledging that Saturday was the Claimant's worship day. Yet, the Respondent protected Sunday as a rest day for the benefit of other employees whose worship day was Sunday. Accordingly, I declare the Respondent's handling of the Claimant's worship day as discriminatory. I also declare the conduct of the Respondent in this respect as a violation of the Claimant's freedom of religion.
61. The Claimant has prayed for salary in lieu of notice. Under section 35 of the *Employment Act*, the minimum notice period that the Claimant was entitled to before terminating her contract was 28 days. However, by its letter to the Claimant dated 22nd April 2014, the Respondent increased this period to three months. Accordingly, I enter judgment for the Claimant for salary for three months in lieu



of notice to terminate under section 36 as read with sections 35 and 49 of the Employment Act. The Claimant produced her January 2018 pay slip showing her salary at the time was Kshs 214, 480,00. Accordingly, I award the Claimant Kshs 643,440.00 being salary for three months in lieu of notice to terminate.

62. The Claimant testified that she was sent on compulsory leave during her suspension. She was forced to utilize her 40 days accrued leave during the suspension period. The Respondent's witness did not dispute this fact. On the contrary, the witness confirmed that indeed the Claimant was forced to utilize her accrued leave days during her compulsory leave. As the decision to terminate the Claimant's contract has been declared invalid, the decision to apply the Claimant's accrued leave days to her suspension period is declared irregular. The Claimant is entitled to recover pay in lieu of accrued leave for the 40 days.
63. From her pay slip, the Claimant's gross monthly salary on exit was Kshs 214,480.00. Therefore, her daily rate was Kshs 7,149.00. For the accrued 40 days, her entitlement would be Kshs 7,149.00 x 40 = Kshs 285,973.00. As the Claimant has claimed for a lesser sum of Kshs 278,824.00 I enter judgment in her favour for this sum claimed, that is to say, Kshs 278,824.00.
64. The Claimant has also claimed for compensation for unfair termination. As I have observed in the preceding parts of this decision, it is clear to me that the Respondent not only terminated the Claimant's employment without valid reason but also violated the Claimant's freedom from discrimination and freedom of religion. The circumstances leading to the Claimant's termination were unnecessarily harsh and disrespectful of her person. I have taken note of the Claimant's evidence that in addition to her suspension, her accrued leave days were unilaterally taken and applied to cover her compulsory leave. This is notwithstanding that neither the Employment Act nor the contract between the parties entitled the Respondent to handle the issue in this way. I note that the Respondent did not controvert this evidence. The Respondent's conduct amounted to treating the Claimant as a mere tool in its production chain. Her rights did not really matter in the process. It is important that employers uphold the human dignity of those who work for them at all times. Having regard to these facts and the various elements under section 49 of the Employment Act such as the duration the Claimant had served the Respondent, I consider that an award of compensation equivalent to the Claimant's gross salary for 12 months is fair in the circumstances. This works out to Kshs 2,573,760.00. In rendering this award, I have also considered the fact that there was nothing in the Claimant's conduct that would legitimately be said to have contributed to the Respondent's apparently harsh reaction.
65. I award the Claimant interest on the amounts awarded at court rates from the date of this decision.
66. The amounts awarded are subject to the applicable statutory deductions.
67. I award the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER



In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

